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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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State of Alabama

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NATURE OF INTEREST

The State of Alabama has a unique interest in the outcome of this case which is not shared by other *amici* states, namely that Alabama has been litigating for over three years a separate action involving the same issues and the same primary defendant involved in the present case. A petition for a writ of certiorari in that action filed on behalf of TVA and other federal defendants is presently pending before this Court, and the Court's ruling in the present case will for all practical purposes be dispositive of the Alabama case. *(Seeber v. Alabama,* No. 74-851, Petition for Writ of Certiorari filed January 6, 1975.)

ARGUMENTS NOT ADEQUATELY PRESENTED

The State of Alabama recognizes that several *amici* briefs have been filed to date in support of the position of the Commonwealth of Kentucky. Nevertheless, not one of these briefs, including the original and reply briefs of the Commonwealth of Kentucky, have adequately represented the interests of the various states in the outcome of this litigation. The brief which Alabama submits herewith presents a thorough and concise analysis of the issues before this Court, and fills in many of the substantial gaps in the briefs already filed.

For example, Alabama's brief presents the only comprehensive analysis of Section 304 of the Act, 42 U.S.C. 1857 h-2, to date (pp. 25-30). A proper interpretation of this section is crucial to the outcome of this case, since, as discussed in the Alabama brief, respondents' argument that Section 118 of the Clean Air Act subjects federal facilities to only state emission standards and compliance schedules fails completely if Section 304 is not interpreted as they contend.

Nor have the briefs filed in support of Kentucky's position, or the Fifth Circuit's opinion in *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974), sufficiently explained the reasons for the Act's disparate treatment of existing and new federal pollution sources, as does the Alabama brief. (pp. 21-25). In fact, all of the briefs written to date have overlooked the fact that Section 111 (d) of the Act, 42 U.S.C. 1857 c-6 (d), provides for state regulation of existing federal sources through the use of permits, whereas Section 111 (c)(1) specifically exempts new federal sources from state permit requirements.

The State of Alabama believes that it is essential for this Court to read its discussion of the legislative history of the Clean Air Amendments of 1970. (pp. 30-36). Although

this is the mainstay of respondents' argument, no one has offered an explanation as to why portions of the legislative history appear to be inconsistent with the plain language of the Act itself. Recognizing this inconsistency, the Fifth Circuit and the Commonwealth of Kentucky have simply dismissed the legislative history as sketchy and ambiguous; but the State of Alabama submits that the legislative history *is* consistent with the express language of the Act. A thorough and precise reading of the entire history of the Amendments (which apparently has not been done by any participant in this litigation to date) reveals that although respondents are correct in stating that both the original House and Senate versions of the Act *would have* subjected federal facilities to state emission standards and compliance schedules only, the Conference Committee specifically redrafted the Act to clarify that existing federal facilities must comply with *all* state pollution control requirements, including state permit requirements, carefully integrating specific changes into various sections of the Act—the exact *same* sections which the courts have consistently recognized as supporting Kentucky's position.

Finally, although the respondents' contention that special consideration should be given to the Environmental Protection Agency's interpretation of Section 118 requires little response, the State of Alabama believes that its discussion of this issue is the only complete and logical such discussion snubmitted thus far.

Alabama recognizes that its brief is late. Attorneys for the State of Alabama originally anticipated that the petition for certiorari in the *Seeber* case would be granted together with the granting of the petition in the present case. When the Court granted the petition herein on March 17, 1975, Alabama was not notified of this action, and only learned this

fact later upon inquiry to the Clerk of the Court concerning the status of its own case. Alabama then moved this Court to consolidate the Alabama case with the present case, but this motion was denied on October 14, 1975.

The original Alabama action in the *Sceber* case was commenced over three years ago, almost one month before Kentucky brought its own action. Through the years, the attorneys for the State of Alabama have acquired a thorough understanding of the Clean Air Act and the issues involved in the present case, and have demonstrated the ability to clearly present these issues to the Fifth Circuit. The *amicus* brief submitted on behalf of the State of Alabama represents a diligent effort on behalf of its attorneys to present the same issues to this Court in an even more thorough and concise manner, and Alabama therefore prays that the Court accept this brief, and avail itself of the thought and effort which has gone into it.

Respectfully submitted,

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